



Signed: August 18, 2008

EDWARD D. JELLEN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 07-40192 EDJ  
KIM T. RYDER, Chapter 7  
Debtor./

MEMORANDUM DECISION

The issue before the court is whether Kim T. Ryder, the above debtor ("Ryder"), must file a new means test form following conversion of her chapter 13 case to chapter 7. The court concludes in the negative.

On January 19, 2007, Ryder filed a voluntary petition under chapter 13 of the Bankruptcy Code. Among the papers Ryder filed was Official Form 22C entitled "Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income." The form showed that Ryder was below the applicable median income.

On May 9, 2008, Ryder caused her chapter 13 case to be converted to chapter 7. On May 13, 2008, the Clerk of Court generated and served Ryder with a document entitled "Order to File Required Documents [and] Notice of Automatic Dismissal" (the

Memorandum Decision

1 "Order"). The Order stated that Ryder had failed to file a  
2 "Statement of Current Monthly Income and Means Test Calculation  
3 (Form B22)." The Order went on to say that unless Ryder filed that  
4 form within 15 days, or a request for an extension of time, or a  
5 written request for an order excusing the filing of the form, her  
6 bankruptcy case could be dismissed without further notice or  
7 hearing.

8 Thereafter, Ryder filed a timely request for a hearing and an  
9 opposition to the threatened dismissal. The opposition argues that  
10 the Bankruptcy Code does not require a debtor that converts a  
11 chapter 13 case to chapter 7 to file a new means test form.

12 The court is not aware of any binding authority on the issue.  
13 The non-binding authority is split. Compare In re Fox, 370 B.R. 639  
14 (Bankr. D.N.J. 2007) (new means testing not required after  
15 conversion) and In re Perfetto, 361 B.R. 27 (Bankr. D.R.I. 2007)  
16 (new means testing required after conversion).

17 Fox reached the conclusion that a new means test is not  
18 required after conversion based on the language of Bankruptcy Code  
19 § 707(b). Section 707(b) provides, in relevant part, that the court  
20 "may dismiss a case filed by an individual debtor under this  
21 chapter" if the granting of chapter 7 relief would be an abuse of  
22 chapter 7. (Section 707(b) goes on to provide for a presumption of  
23 abuse if the means testing formula raises a presumption.) Fox  
24 reasoned that because the debtor had not "filed" a petition under  
25 chapter 7, but rather under chapter 13, means testing under  
26 § 707(b) was not required. 370 B.R. at 642-43.

1        Perfetto reached the opposite conclusion based on what the  
2 court considered to be "the common sense" view. 361 B.R. at 30.  
3 The court also found support for its conclusion in Bankruptcy Code  
4 § 348(a).<sup>1</sup> Id. at 30-31.

5        The court finds the Fox analysis more persuasive. The language  
6 of § 707(b) refers to a filing, not a conversion. And, as Fox  
7 noted, § 707(b)(2)(A)(ii)(I) (part of the means test) refers to  
8 expenses "as in effect on the date of the order for relief" rather  
9 than the date of a conversion. Further, the Fox court noted that  
10 § 348(b), which the Perfetto court did not cite, defines the  
11 sections where "order for relief" refers to the conversion of a  
12 case, and § 707(b) is not listed.<sup>2</sup>

13        It could be argued that unless new means testing is required  
14 after a conversion, debtors could abuse the system by filing chapter  
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16        <sup>1</sup>Bankruptcy Code § 348(a) provides: "Conversion of a case  
17 from a case under one chapter of this title to a case under  
18 another chapter of this title constitutes an order for relief  
19 under the chapter to which the case is converted but ... does not  
20 effect a change in the date of the filing of the petition, the  
21 commencement of the case, or the order for relief."

22        <sup>2</sup>Moreover, the notion that "common sense" requires new means  
23 testing after a conversion could certainly be debated.  
24 Presumably, the purpose of means testing is to preclude chapter 7  
25 relief to debtors who can fund a chapter 13 plan. Therefore, the  
26 court has difficulty accepting the view that "common sense"  
dictates that a debtor who, in good faith, fails in chapter 13  
must automatically be means tested upon a conversion to chapter 7  
to see if the debtor should be presumed to be an abuser whose  
case belongs in chapter 13.

1 13 and converting their cases to chapter 7 in order to avoid chapter  
2 7 means testing. Such an argument, however, is specious. First,  
3 the argument does not justify departure from the statutory language.  
4 In addition, the court always has authority to dismiss a chapter 13  
5 case not filed in good faith. In Re Leavitt, 171 F.3d 1219 (9th  
6 Cir. 1999). A chapter 13 case filed for purposes of converting the  
7 case to chapter 7 in order to avoid chapter 7 means testing would  
8 certainly come under that heading. See also Marrama v. Citizens  
9 Nat'l Bank of Mass., 549 U.S. 365 (2007) (holding that a chapter 7  
10 debtor acting in bad faith does not have an absolute right under the  
11 Bankruptcy Code to convert a chapter 7 case to chapter 13).

12 The court therefore requests Ryder's counsel to submit to the  
13 court a proposed order providing that Ryder need not file Official  
14 Form 22A, and that her chapter 7 case is not to be dismissed based  
15 on the fact that she did not file Official Form 22A.

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17 \*\*END OF ORDER\*\*  
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